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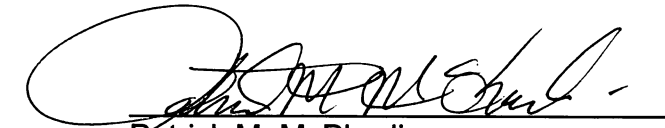
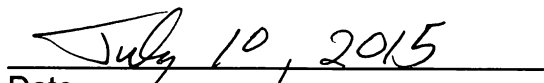
**Annual Report on Navigator Privacy and Security Training in the
Federally-Facilitated Marketplace and the Department's Process for Receiving,
Investigating, and Referring Complaints Regarding Navigators and Certified
Application Counselors**

July 1, 2015

Determination

As required by Section 1262(5) of the Insurance Code of 1956 (Code), MCL 500.1262(5), and as further supported by the findings in this report¹, I have concluded that the federal training program for Navigators and Certified Application Counselors adequately "protects the privacy and security of personally identifiable information of the residents of this state under the laws of this state." Based upon this finding, the Department of Insurance and Financial Services is not required to implement a state program to certify and train Navigators and Certified Application Counselors. Therefore, no changes have been implemented nor are any being recommended at this time.

In addition, included within this report is a description of the process for receiving, investigating, and referring to the Federally-facilitated Marketplace, citizen complaints regarding Navigators and Certified Application Counselors, as required by Section 1271 of the Code, MCL 500.1271.


Patrick M. McPharlin
Director
Date

¹ The Department of Insurance and Financial Services acknowledges that a finding that the federal program adequately protects the privacy and security of personally identifiable information requires only a "determination" be provided by the Director. Given this is the inaugural evaluation and determination made under Public Act 566 of 2014, the Department felt a more detailed analysis and explanation was warranted.

Introduction

Michigan currently has a Federally-facilitated Marketplace (FFM), which is operated by the federal government with assistance from the Department of Insurance and Financial Services (DIFS). One of the FFM functions the federal government has assumed is the training and certification of Navigators and certified application counselors (CACs). Navigators and CACs assist consumers with the selection of an FFM health insurance plan.

Public Act 566 of 2014 was originally introduced in April of 2013 and was enacted and signed into law by the Governor on January 10, 2015. The Act added Chapter 12A to the Insurance Code of 1956 (Code), MCL 500.1261-1272. Section 1262(5) of the Code, MCL 500.1262(5), requires the Director of DIFS to “determine whether a program to certify and train navigators protects the privacy and security of personally identifiable information of the residents of this state under the laws of this state.”

Section 1271 of the Code, MCL 500.1271, requires the Director of DIFS to “develop and implement a process” for receiving, investigating, and referring to the FFM citizen complaints regarding Navigators and CACs. In addition, the Director of DIFS is required to provide an annual report detailing this complaint process.

This report analyzes whether the current privacy and security training standards and programs that are required of Navigators and CACs performing functions in Michigan’s FFM adequately protect the privacy and security of personally identifiable information (PII) of Michigan residents and details the process for handling citizen complaints regarding Navigators and CACs.

Privacy and Security of PII

Applicable Federal Regulations

Under federal regulations, Navigators and CACs in all FFMs are required to obtain continuing education and be certified and/or recertified on at least an annual basis. 45 CFR § 155.215(b)(1)(iv); 45 CFR § 155.225(d)(7). The Centers for Medicare and Medicaid Services (CMS) periodically updates its training modules, curriculum, and website, and issues guidance to FFM Navigators and CACs regarding compliance with training requirements. See, e.g., CMS Enrollment Assister Bulletin 2014-01, “Guidance Regarding Training, Certification, and Recertification for Navigator Grantees, Certified Application Counselors, and Non-Navigator Assistance Personnel in the Federally-Facilitated Marketplaces” (August 15, 2014).

Navigator and CAC training covers numerous topics, including privacy and security standards for PII. These privacy and security standards are set forth in 45 CFR § 155.260 (the PII Rule). Navigators and CACs are required to obtain expertise in the privacy and security standards in the PII Rule, and to comply with any such standards established by the FFM. See 45 CFR §155.210(b)(2)(iv); 45 CFR § 155.225(d)(3).

The PII Rule

The PII Rule limits the circumstances under which PII may be used or disclosed to the following: 1) to perform Exchange functions as listed in 45 CFR § 155.200; and 2) for other Exchange functions not listed in 45 CFR § 155.200 but for which the individual provides consent for his or her information to be disclosed. In the second instance, CMS must determine that the PII “will be used only for the purposes of and to the extent necessary insuring the efficient operation of the FFM consistent with section 1411(g)(2)(A) of the Affordable Care Act, and that the uses and disclosures are also permissible under relevant law and policy.” 45 CFR 155.260(a)(iii)(A).

The PII Rule also requires FFMs, Navigators, and CACs to comply with privacy and security standards consistent with the following principles:

- individual access;
- opportunity for an individual to correct information;
- openness and transparency;
- individual choice;
- collection, use and disclosure limitations;
- data quality and integrity;
- safeguards; and
- accountability.

The PII Rule requires an FFM to establish “operational, technical, administrative, and physical safeguards that are consistent with any applicable laws” to ensure the privacy and security of PII. In addition, the FFM must “monitor, periodically assess, and update the security controls and related system risks to ensure the continued effectiveness of those controls.”

In implementing the above-described privacy and security standards, the CMS has issued numerous types of guidance and training modules for Navigators and CACs. These include the following major training documents:

- “Training, Certification, and Recertification for Navigators and CACs [Certified Application Counselors] in the FFM in 2014-2015” (August 8, 2014), attached hereto as Appendix A;
- “Assister Guidance: Obtaining Consumer Authorization and Handling Consumers’ Personally Identifiable Information (PII) in the Federally-facilitated Marketplaces (FFMS)” (November 7, 2014), attached hereto as Appendix B;
- “How to Obtain a Consumer’s Authorization before gaining Access to Personally Identifiable Information (PII),” attached hereto as Appendix C;
- “Model Navigator Assistance Consent Form in Federally-Facilitated or State Partnership Marketplaces,” attached hereto as Appendix D.

Applicable Michigan Law

The protection of PII in Michigan is governed largely by the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). While some protections exist in the Public Health Code, MCL 333.1101 *et seq.*, those protections apply to health care professionals and would not apply to Navigators and CACs. Certain protections also exist in the Identity Theft Protection Act, PA 452 of 2004, MCL 445.61 through 445.79c,

but these apply only to the destruction (not retention or treatment) of data containing personal information, and this provision only requires the destruction of such data when it is not being retained for purposes “not prohibited by state or federal law.” Because federal regulations establish a separate record retention requirement, see 45 CFR 92.42, 45 CFR 74.53, and 45 CFR 155.210(6), the federal record retention requirements would apply.

Some Navigators that are affiliated with a “covered entity,” as that term is defined by the federal Health Insurance Portability and Accountability Act (HIPAA), would be subject to HIPAA’s privacy and security rules as well as the FFM privacy and security rules. See, e.g., 45 CFR 164.502(e), 164.504(e), 164.532(d) and (e) (defining what entities are “business associates” of HIPAA-covered entities). There is significant overlap between the HIPAA rules and the FFM rules, however, so a Navigator that is not a “business associate” under HIPAA would not be considered to be inadequately trained on privacy and security under the FFM rules.

Conclusion

Given the extensive nature of the privacy and security standards applicable to Navigators, CACs, and the FFM, and the absence of any conflict between those standards and Michigan law, I have concluded that the federal training program for Navigators and CACs “protects the privacy and security of personally identifiable information of the residents of this state under the laws of this state” as set forth in MCL 500.1262(5).

Complaint Process

The DIFS Office of Consumer Services assists consumers who have complaints regarding: health insurance products, the FFM, life and health insurance agents, and Navigators and CACs. Complaints or inquiries are received via telephone, written correspondence, or in-person.

Complaints are reviewed in accordance with state and federal statutes. Navigator and CAC complaints are first reviewed by the DIFS Affordable Care Act Resource Ombudsman. Referrals are made for further review of possible violation of the law to the DIFS Insurance Investigations Unit, and if appropriate, to the FFM for further investigation and/or enforcement.

APPENDICES

APPENDIX A

Training, Certification, and Recertification for Navigators and CACs in the FFM in 2014-2015

<https://marketplace.cms.gov/technical-assistance-resources/training-recertification-for-navigators.pdf>

APPENDIX B

Assister Guidance: Obtaining Consumer Authorization and Handling Consumers' Personally Identifiable Information (PII) in the Federally-facilitated Marketplaces (FFMs)

<https://marketplace.cms.gov/technical-assistance-resources/assister-programs/ffm-assister-pii-guidance-.pdf>

APPENDIX C

How to Obtain a Consumer's Authorization before Gaining Access to Personally Identifiable Information (PII)

<https://marketplace.cms.gov/technical-assistance-resources/obtain-consumer-authorization.pdf>

APPENDIX D

DRAFT Model Authorization Form for Navigators in a Federally Facilitated marketplace or State Partnership Marketplace

<https://marketplace.cms.gov/technical-assistance-resources/draft-authorization-form-navigators.pdf>